

EX PARTE OR LATE FILED

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)
)
Cellular Service and Other Commercial Mobile)
Radio Services in the Gulf of Mexico)
)
Amendment of Part 22 of the Commission's)
Rules to Provide for Filing and Processing)
of Applications for Unserved Areas in the Cellular)
Service and to Modify Other Cellular Rules)

Docket No. 97-112

CC Docket No. 90-6

To: The Commission

WRITTEN EX PARTE PRESENTATION OF BACHOW/COASTEL, L.L.C.

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SUMMARY

Bachow/Coastel, L.L.C. (“Bachow/Coastel”) respectfully requests that the Commission terminate its rulemaking proceeding for cellular service in the Gulf of Mexico (WT Docket No. 97-112, CC Docket No. 90-6) without adopting any new rules. The ills of cellular service in the Gulf that this rulemaking proceeding intended to remedy in 1997 have since dissipated. The Gulf carriers are now providing virtually seamless coverage along the Gulf coast. Also, there is no “subscriber capture” problem emanating from the waters of the Gulf, as this proceeding’s record still has no clear documentation that Gulf carriers are capturing land carriers’ subscriber traffic.

Nevertheless, the land carriers have attempted to create new problems for the Commission to resolve in this rulemaking proceeding. The land carriers’ motivation in the promulgation of new Commission is clear: the promise of the Second Further Notice of Proposed Rulemaking to take 16,310 square miles of license territory from the Gulf carriers to create a “neutral zone” for the land carriers to expand their license areas, free of charge. First, the land carriers claim that the current rules do not allow them to serve all land areas of their licenses, thus impairing regular service and E-911 service (always a “hot button” for Commission review). These claims are unsupported by any real-world engineering, or recordation of any incidents endangering public safety. This land carrier claim is also patently false, as two different engineers have demonstrated to the Commission that the land carriers can serve their license areas without illegal service area boundary (“SAB”) contour extensions into the Gulf. This land carrier assertion is just one in a litany of mischaracterizations and falsehoods designed to convince the Commission to adopt rules to allow the land carriers free reign to encroach by 16,310 square miles into the Gulf carriers’ license territory, and insulate the land carriers from effective competition by replacing the wireless marketplace in the Gulf with a set of new regulations.

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Bachow/Coastel, L.L.C. ("Bachow/Coastel"), pursuant to section 1.1206(b)(1) of the Commission's rules¹ and by its attorneys, hereby submits the following written *ex parte* presentation for the Commission's consideration in the above-referenced dockets. On February 28, 2001, ALLTEL Corporation, *et al.* (the "Coalition") filed a written *ex parte* presentation with the Commission concerning the above-referenced proceedings,² presumably to "educate" Commission staff recently assigned to these proceedings with a "history" of the proceedings, skewed to the economic interests of the Coalition members. Bachow/Coastel's instant *ex parte* presentation is an attempt to clarify this muddled record.

¹ See 47 C.F.R. § 1.1206(b)(1). Bachow/Coastel is concurrently submitting two copies of this presentation to the Commission's secretary under separate cover for inclusion in the public record. This presentation relates to more than once proceeding; thus, Bachow/Coastel is filing an additional two copies for the second proceeding.

² See Coalition Written *Ex Parte* Presentation, WT Docket No. 97-112, CC Docket No. 90-6, February 28, 2001 (the "Coalition Filing").

The Gulf carriers, and the Commission's rules, did not create service problems on the Gulf-adjacent land areas. The land carriers could solve their service problems by re-engineering their systems;³ they have chosen not to. The land carriers have also never shown that they need a ten-mile SAB extension to serve the beach.

Solving the land-based coverage problems would cost the land carriers two things: (1) money spent on new construction to serve their own license areas; and (2) their central argument for the "necessity" of new Commission rules. Under the current rules, the land carriers can establish sufficient strength to provide reliable service to their customers,⁴ including the provision of E-911 service. The Commission's rules do not need to change to solve coverage problems on land - only the land carriers need to change their approach.

Science requires the maintenance of two different propagation formulae. The "disparate" regulatory treatment⁵ of different formulae for signal travel over land versus water simply reflects scientific fact - radio signals travel farther over water than land. The land carriers have never refuted this. Thus, there is no need to change these formulae in the Commission's rules.

There is still no documentation in the record demonstrating that Gulf carriers are capturing land subscribers. There is only one questionable land subscriber bill in the record that

³ See Presentation of Bachow/Coastel, L.L.C., at engineering exhibits (Comments of Michael E. Hofe, Vice President, Domestic Engineering of o2wireless Solutions, Inc. and Comments of Tom L. Dennis, P.E.) (July 28, 2000) (the "July 28 Presentation").

⁴ *Id.*

⁵ See Coalition Filing at Summary, p. 2.

supports this land carrier notion.⁶ On the other hand, the Gulf carriers have produced a study based upon real-world data that conclusively demonstrates that land carriers are capturing Gulf carriers' subscribers.⁷

The Gulf carriers provide high-quality service to the deep waters of the Gulf. The land carriers are raising a red herring with the notion that Gulf carriers move with rigs, and create unserved territory in the deep waters of the Gulf.⁸ There is no public outcry concerning any possible "dead space" in the deep waters - this is not a credible issue. The land carriers have already declared their lack of interest in serving the deep waters of the Gulf at industry meetings.

The Coalition Filing mischaracterizes the basis of Gulf carriers' rates. The land carriers refuse to recognize that the Gulf carriers' rates are the product of service costs, not the "duopoly economics of the Gulf."⁹ These costs are different from the costs faced by land carriers, and demonstrate the "unique plight" of Gulf carriers (as described by the D.C. Circuit in *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164 (D.C. Cir. 1994) ("*Petroleum*"). Also, the notion that Gulf carriers do not face competition is meritless. Not only do the Gulf carriers compete among

⁶ See Supplemental Reply Comments of GTE Service Corporation and Texas RSA 20 B2 Limited Partnership at Exhibit A (May 30, 2000).

⁷ See 1998 Dennis Study (the "Dennis Study") (included in the *Ex Parte* Presentation of Petroleum Communications, Inc., Attachment 3 (January 8, 2001)).

⁸ See Coalition Filing at Summary, p. 3.

⁹ *Id.*

themselves, but they also face constant competition from the land carriers that extend their service area boundary ("SAB") contours into the Gulf waters to capture Gulf-based subscribers.¹⁰

The Coalition's claim that Gulf carriers view roaming subscribers as an opportunity to add \$3.00 per minute in income¹¹ is a complete mischaracterization. Bachow/Coastel has offered roaming rates to its adjacent land carrier licensee at one-sixth that cost, only to have that land carrier reject the offer (in order for the land carrier to preserve its argument for a rules change).¹² This fact, and the FCC's withdrawal from regulating cellular rates,¹³ does not warrant a change of the rules.

ALLTEL is asking the Commission for insulation from competition by claiming that Gulf carrier rates are harming them competitively.¹⁴ Commission precedent clearly dictates that the Commission does not shield carriers from competition.¹⁵ For example, if ALLTEL loses to its

¹⁰ See *Bachow/Coastel, L.L.C., Complainant v. GTE Wireless of the South, Inc., Defendant*, Order, DA 00-420 (E.B. rel. Feb. 29, 2000), *aff'd*, *Bachow/Coastel, L.L.C., Complainant v. GTE Wireless of the South, Inc., Defendant*, Order on Review, FCC 01-59 (rel. Feb. 22, 2001) ("*Bachow*").

¹¹ See Coalition Filing at Summary, p. 3 and Presentation, p. 6.

¹² See *Ex Parte Presentation of Bachow/Coastel, L.L.C.*, WT Docket No. 97-112, CC Docket No. 90-6 (March 14, 2001) (the "March 14 Presentation").

¹³ See *Rogers Radiocall, Inc.*, Final Decision, 96 FCC 2d 1172, ¶ 49 (1984) (citing *Houston Mobilefone, Inc.*, 65 FCC 2d 848, 859 (Rev. Bd. 1977), *review denied*, FCC 78-477 (July 11, 1978), *remanded sub nom. Mobilfone Service Inc. v. FCC*, 605 F.2d 572 (D.C. Cir. 1979); *on remand Houston Mobilefone Inc.*, 78 FCC 2d 1067 (1980).

¹⁴ See Coalition Filing at Summary, p. 4 and Presentation, p. 7.

¹⁵ See *Atlantic Business and Community Development Corporation, Debtor Internal Revenue Service v. Subranni*, 994 F.2d 1069 (3d Cir. 1993) (citing *F.C.C. v. Sanders Bros. Radio*

cellular A-side competitor (which also has an adjacent Gulf carrier), or PCS carrier, that is ALLTEL's problem, not the Commission's. The Coalition even laments that their *own* agreements with Gulf carriers do not serve the consumers, and competitively harms them.¹⁶ (Apparently, the Coalition members have decided that the solution is not to negotiate on reasonable terms with Bachow/Coastel.¹⁷) The Commission's rules should not be blamed for the negotiating decisions of the Coalition members. The FCC cannot protect the Coalition members from themselves by creating new Gulf cellular rules to replace the wireless marketplace.

The data that Bachow/Coastel uses in its negotiations with land carriers are from the land carriers themselves. ALLTEL claims that Bachow/Coastel's request for 67% of the revenue from the Mobile Bay coastline cell sites is unreasonable.¹⁸ However, Bachow/Coastel derived that figure from data entered into the public record by GTE Wireless of the South, Inc. ("GTE").¹⁹ In particular, ALLTEL Corporation is recklessly jeopardizing chances for an agreement with Bachow/Coastel by ignoring Bachow/Coastel's basis for its request; thus, ALLTEL is recklessly

Station, 309 U.S. 470, 475-76 (1940); *see also Eligibility for Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, Report and Order, 10 FCC Rcd 6280, ¶ 36 (1995); *Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 10 FCC Rcd 3030, ¶¶ 21, 96 (1994).

¹⁶ See Coalition Filing at 12.

¹⁷ See Reply Comments of Bachow/Coastel, L.L.C., WT Docket No. 97-112, CC Docket No. 90-6, pp. 11-13 (May 30, 2000); *see also* the March 14 Presentation.

¹⁸ See Coalition Filing at Summary, p. 4.

¹⁹ See Answer of GTE Wireless of the South, Inc., File No. WB/ENF-F-98-005, p. 12 (September 9, 1998).

jeopardizing service to its own customers by continuing to mischaracterize Bachow/Coastel's negotiating stance to the Commission and the United States Congress.²⁰ Furthermore, ALLTEL has yet to produce any data supporting the use of a lower revenue percentage.

The land carriers' joint proposal, as described in the Coalition Filing, does create a "move it and lose it" regulatory regime for the Gulf carriers, which the D.C. Circuit has already rejected.²¹ The Coalition Filing's statement that its plan does not create "move it and lose it" is illusory. If the frequency coordination element is present in the Coalition's plan, the likelihood remains that a Gulf carrier could be forced to move to another part of the Gulf (due to the move of an oil rig, etc.), and have a land carrier occupy its vacated space before the Gulf carrier could return. Then, frequency coordination would block the Gulf carrier's return. The only way to solve the "move it and lose it" problem is to grant the land carriers secondary authority, which means that the land carriers could serve the Gulf waters if such service does not overlap with the Gulf carriers' service. The land carriers would have to move when the Gulf carriers commence serving that part of the Gulf.

The Coalition Filing's "example"²² of Bachow/Coastel supporting a land-based formula for the water is factually incorrect. Bachow/Coastel used a land-based formula in the application

²⁰ ALLTEL unilaterally disclosed the substance of its negotiations with Bachow/Coastel to the office of U.S. Senator Blanche Lincoln.

²¹ *See Petroleum* at 1173.

²² *See Coalition Filing* at Summary, p. 4 and Presentation, p. 14.

referenced by the Coalition Filing (File No. 0000113774) because Bachow/Coastel's application proposed to serve LAND, not water. Bachow/Coastel's application proposed to serve the unserved *land* areas of the Mobile MSA; thus, it used the land formula, as prescribed by the Commission's rules.²³ Sophisticated cellular operators such as Coalition members surely understand this elementary concept. Their arguments concerning Bachow/Coastel's application are clearly disingenuous, serving only to present another unsubstantiated argument requiring a response by Bachow/Coastel. Bachow/Coastel remains consistent in its position that the water-based formula should be used for serving water, and the land-based formula should be used for serving land.

The Coalition Filing's statement that the land carriers' joint proposal would allow Gulf carriers a stronger signal at the shore and to "effectively 'beat-back' the signal of the land-based carrier over Gulf waters"²⁴ **creates a contradiction that eviscerates the core of their argument for new rules.** This statement is an admission that land carriers' signals are stronger at the shore than Gulf carriers' signals, and thus that there is more capture of Gulf subscribers than land subscribers; otherwise, there would be no reason to improve the Gulf carriers' signal at the shoreline. Ironically, the land carriers' statement supports the findings of the 1998 Dennis Study, which found that the B-side land carriers' signal at the shore was at least ten times stronger than the B-side Gulf carriers' signal at the shore.²⁵ Of course, the Coalition Filing contradicted itself again when, in footnote 5 on p.4, it asserts that Gulf carriers' signals are strong enough to capture land subscribers in

²³ See 47 C.F.R. § 22.911(a)(1).

²⁴ See Coalition Filing at Summary, p. 4.

²⁵ See 1998 Dennis Study at p. 3.

open areas and on the beach.²⁶ Which is it? The Commission cannot legitimately adopt rules with such a contradictory basis.²⁷

The D.C. Circuit in the *Petroleum* decision did attack the FCC's rationale, as noted by the Coalition Filing.²⁸ Unfortunately for the land carriers' joint proposal, the Court decided that any rationale that did not take into account the unique plight of the Gulf carriers was invalid.²⁹ The Coalition Filing's surface-level analysis of the *Petroleum* decision only serves to provide false hope to the Commission that its proposed rules, or the land carriers' joint proposal, would survive judicial review. Any Commission-adopted rules that “silently gloss” over the Gulf carriers’ “unique plight” to require Gulf carriers and land carriers to follow the same service rules will ultimately fail.³⁰

The "patently unfair situation" regarding cellular geographic service area rules referenced by the Coalition Filing³¹ is not unfair at all, given the unique plight of Gulf carriers (having no control over relocations, no mandatory collocation, etc.). The D.C. Circuit judged this regulatory regime as fair, because it was the just solution considering the Gulf carriers’ “unique

²⁶ See Coalition Filing at p. 4, n.5.

²⁷ “[W]here the record belies the agency’s conclusion, we must undo its action.” *Petroleum* at 1172 (citing *American Tel. & Tel. Co. v. FCC*, 298 U.S. App. D.C. 1, 974 F. 2d 1351, 1354 (D.C. Cir. 1992)).

²⁸ See Coalition Filing at p. 2.

²⁹ See *Petroleum* at 1173.

³⁰ *Id.*

³¹ See Coalition Filing at 4.

plight.” The Coalition is asking the Commission to treat Gulf carriers and land carriers alike on the issue of Phase II filings. That is the same flawed logic (treating land and Gulf carriers alike) that the D.C. Circuit cited when it vacated the Commission's proposed rules in *Petroleum*.³²

The Coalition Filing’s ramblings concerning the Gulf carriers not being able to serve hand-held units on land and in buildings on land³³ is mysterious at best. Gulf carriers do not serve the land; they serve the water.

The Coalition Filing distorts Bachow/Coastel’s pleading history at the Commission.

Bachow/Coastel does not oppose all of ALLTEL's STAs off of Florida, only the one (out of three ALLTEL STAs) that overlaps Bachow/Coastel's shared Mexico Beach, FL cell site. Not only did Bachow/Coastel not oppose the other two STAs, it has not opposed the 4,650 square miles of SAB contour extensions into the Gulf from the land carriers in Florida.³⁴ The Coalition Filing attempts to frighten the Commission with the threat of a "flood of litigation over forced contour pullbacks."³⁵ Yet, since the Enforcement Bureau issued its decision last year, there has been no litigation regarding forced pullbacks. In fact, the Gulf cellular market has witnessed only one complaint proceeding regarding pullbacks. Obviously, the current rules are not creating a "flood of litigation." The

³² See *Petroleum* at 173.

³³ See Coalition Filing at 4-5.

³⁴ See Comments of Bachow/Coastel, L.L.C., WT Docket No. 97-112, CC Docket No. 90-6, at 35 (July 2, 1997).

³⁵ See Coalition Filing at 8.

Coalition Filing overstates the level of conflict in the Gulf to support its notion that new rules are warranted. On the other hand, Commission adoption of its proposed rules, or the land carriers' joint proposal, will definitely cause litigation.

The Coalition Filing's attack of the Dennis Study lacks merit. The Dennis Study used real-world drive-tested data; the Calkins "study" is a model, not a study of what is actually happening. Part of the Dennis study is from driving on a highway, but it was a highway along the beach. The Coalition Filing makes it sound like the study was conducted on I-70 in Missouri. The Commission's decision in *Bachow*, and the documented land carrier SAB extensions into the Gulf, essentially prove the truth of the Dennis study.

CONCLUSION


There is no reason for the Commission to adopt its proposed rules in this proceeding, or the land carriers' joint proposal. The Gulf carriers are serving their licensed territory, and the land carriers, as demonstrated by the engineering statements submitted in this proceeding, have the ability (although not the motivation, apparently) to effectively serve their license areas. The record in this proceeding lacks any substantial evidence that the Gulf carriers are capturing land carriers' subscribers; rather, the land carriers themselves admit that the land carriers have the stronger signal at the border. There is service even off the coast of Florida, where land carriers are operating at least 4,650 square miles of illegal SAB extensions (with no complaint filings from the Gulf carriers). Furthermore, the Gulf is not the "battleground" depicted by the land carriers, as only one complaint proceeding has occurred in that region. However, the land carriers have used this very rulemaking proceeding (namely, the promise of 16,310 square miles of free license territory, per cellular license block, around the Gulf of Mexico) to delay and stunt negotiations for contour overlap, collocation and cell sharing agreements with Bachow/Coastel.

Both the proposed rules and the land carriers' proposal present rules that would treat land carriers and Gulf carriers alike in a "neutral zone,"³⁶ which is exactly the regulatory scheme that the D.C. Circuit struck down. Given the paucity of facts supporting the need for new rules in the Gulf, any rules that take license territory away from the Gulf carriers cannot possibly be structured to account for the Gulf carriers' "unique plight," which is the regulatory mandate of the D.C. Circuit. Thus, the Commission should meet the D.C. Circuit's remand by terminating this proceeding without issuing new cellular rules in the Gulf of Mexico.

Respectfully submitted,

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³⁶ Bachow/Coastel notes that this proposed zone is not "neutral," as it takes 16,310 square miles of license territory from Bachow/Coastel, and not an inch of license territory from any land carrier.